The Metropolitan
Corporate Counsel®

www.metrocorpcounsel.com

Volume 13, No. 8 August 2005

Project: *Corporate Counsel Part II (Unintended Consequences) – Law Firms*

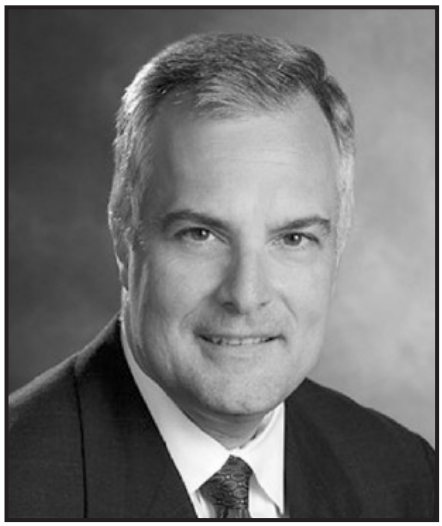
The Effects Of The *Andersen* Decision In Today's Market

Peter G. Verniero

SILLS CUMMIS EPSTEIN & GROSS P.C.

In *Arthur Andersen LLP v. United States*, the U.S Supreme Court reversed the conviction of the former accounting giant whose legal troubles had stemmed from charges that the firm unlawfully destroyed documents concerning Enron Corporation and its collapse. The ink was barely dry on the court's decision when legal pundits began chattering about its expected effects in today's investigatory environment. Before rushing to make any observations in this regard, we ought to pause and consider in some detail what the court did and did not say.

Writing for a unanimous court, Chief Justice Rehnquist briefly described the facts of the case. Arthur Andersen, Enron's auditor, had instructed employees to destroy documents in accordance with the firm's established document retention policy. That policy envisioned a single central engagement file containing "only that information that is relevant to supporting our work." The policy established that, "in cases of threatened litigation, . . . no related information will be destroyed." It also stated that, if the firm "is advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed."



Peter G. Verniero

A series of events occurred that set the stage for the government's prosecution. Among them: media reports suggested improprieties at Enron, the SEC opened an informal investigation, and Arthur Andersen retained counsel to assist it with possible litigation that might flow from Enron's difficulties. The accounting firm also formed an Enron "crisis-response" team.

During the relevant period, according to the court's opinion, a partner of Arthur Andersen "spoke at a general meeting attended by 89 employees, including 10 from the Enron engagement team. [He] urged everyone to comply with the firm's document retention policy." This partner also stated at the meeting that if documents were "destroyed in the course of [the] normal policy and litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."

The jury convicted Arthur Andersen of violating a 2000 version of federal law, which made it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause" such person to "withhold" or "alter" documents in connection with an "official proceeding." In affirming the conviction, the Court of Appeals for the Fifth Circuit concluded that the trial court had instructed the jury properly on the statute's meaning, and that it was not necessary for jurors to find "any consciousness of wrongdoing."

As noted, the Supreme Court reversed. It began its analysis by focusing "on what it means to 'knowingly . . . corruptly persuad[e]' another person 'with intent to . . . cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'" As part of that focus, the court reaffirmed its practice of exercising "restraint" in determining the scope of criminal statutes. Such restraint, the court explained, arises "out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"

The chief justice further observed that restraint was "particularly appropriate" because the conduct at the heart of Arthur Andersen's conviction – persuasion – "is by itself innocuous." In what is perhaps the most supportive passage from a defendant's perspective, the court continued: "Indeed, 'persuad[ing]' a person

***Peter G. Verniero** is co-chair of the Corporate Internal Investigations and Business Crimes Practice Group and chair of the Appellate Practice Group at Sills Cummis Epstein & Gross P.C. in Newark, N.J. He formerly served as a justice of the N.J. Supreme Court as well as attorney general of that state.*

Please email the author at pverniero@sillscummis.com with questions about this article.

'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign." The court added: "Nor is it necessarily corrupt for an attorney to 'persuad[e]' a client 'with intent to . . . cause' that client to 'withhold' documents from the Government."

As examples, the court posited scenarios in which a mother suggests "to her son that he invoke his right against compelled self-incrimination," or in which a corporate client withholds documents by invoking the attorney-client privilege. According to the court, neither scenario reflects improper conduct. The court also took notice of the common practice of document retention policies, "which are created in part to keep certain information from getting into the hands of others, including the Government." The court instructed: "It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."

The court rejected the government's position that the statutory term "knowingly" did not modify "corruptly persuades." In support of its argument, the government had suggested that it was "questionable whether Congress would employ such an inelegant formulation as 'knowingly . . . corruptly persuades.'" In a somewhat amusing response, the chief justice remarked: "Long experience has not taught us to share the Government's doubts on this score, and we must simply interpret the statute as written."

Ultimately, the court concluded that the terms "knowingly" and "corruptly persuade" were to be read together in the statute. The court reasoned: "Joining these meanings together here makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'" It further noted that, "limiting criminality to persuaders conscious of their wrongdoing sensibly allows [the statute] to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'"

From there it was relatively easy for the court to find error in the jury instructions and to set aside the verdict. As the chief justice succinctly observed, "it is striking how little culpability the instructions required." As an example of the instruction's infirmity, the court pointed out that "the jury was told that, 'even if [Arthur Andersen] honestly and sincerely believed that its conduct was lawful, you may find [the firm] guilty.'"

The court also determined that the instructions "diluted the meaning of 'corruptly' so that it covered innocent conduct." The court continued: "The instructions also were infirm for another reason. They led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding."

The court's decision is remarkable for its brevity (it is less than 12 pages), its single-mindedness (there are neither dissenting nor concurring opinions), and its release date (one month from the date the case was argued). Similarly, as an example of judicial opinion-writing, the decision is artfully done: pithy, clear in its reasoning, and even-tempered in tone. In short, whether one agrees or disagrees with it, the chief justice has produced a quality opinion in record time. (As a former judge, I cannot help but highlight judicial craftsmanship when I see it.)

The decision also is notable for what it does not say. It does not exonerate Arthur Andersen; rather, it sets aside the guilty verdict on the narrow ground that jurors received a flawed set of instructions. Nor does it signal an "all clear" sound for corporate managers who might be contemplating wrongful conduct. There is plenty of room within the court's analysis for bad actors to be punished severely for corporate misconduct. The decision, however, does appear to reflect the court's attitude that institutional defendants, no less than individual defendants, must be treated fairly and in accordance with established standards.

That is no doubt welcomed news to executives in the current investigatory climate. In generally referring to the right of corporate clients to withhold documents in accordance with the attorney-client privilege, the court also seemed to buttress the privilege itself. That, too, might be viewed as welcomed relief inasmuch as some commentators have observed that the attorney-client privilege is at risk of erosion in view of Justice Department guidelines. Those guidelines invite corporations to waive the privilege in the hope of receiving favorable treatment by prosecutors.

A critical question is whether the *Andersen* decision will influence cases brought in the aftermath of the Sarbanes-Oxley Act of 2002. The statutory language under the Sarbanes set of rules is different than the 2000 law at issue in *Andersen*. More specifically, the seemingly expansive text of the new provisions appears to provide prosecutors a broader framework within which to a build a case. From that perspective, *Andersen* is probably not the best predictor of how future prosecutions will proceed. That said, the court's strict constructionist approach, as reflected in the *Andersen* decision, might be relevant to future judicial evaluations of post-Sarbanes proceedings.

It also is important to bear in mind that *Andersen* remains a criminal law decision. As great a concern (if not greater) to the typical corporation is the exposure to civil liability for destruction of electronically-stored evidence. There is a body of law developing through civil litigation related to the duty to preserve documents (including e-mails and other electronically-stored data) in anticipation or contemplation of litigation. The court's emphasis on conscious guilt in *Andersen* will be of uncertain utility in the context of an entity's civil duties.

The bottom line is that the effects of the *Andersen* ruling on current or future investigations probably will be mixed. There is enough restraint reflected in the court's decision to prompt government prosecutors to cross every "t" and dot every "i" when seeking a case against a corporate defendant for destruction of evidence. Stated differently, *Andersen* demonstrates how the court will scrutinize and carefully parse a disputed jury instruction when the justices believe that a corporate entity has been treated unfairly. In this hyperactive regulatory climate, that is no small matter. Still, the honest executive should take heed: Be careful what you shred and when you shred it.